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LOW TECH DESIGNS, INC.™

"BRINGING TECHNOLOGY DOWN TO EARTH"℠

Mr. William Caton
Acting Secretary
Federal Comm. Comm.
1919 M. St., N.W.
Rm. 222
Washington, DC 20554

August 12, 1997

Ex Parte

Dear Mr. Caton,

On the above date, Mr. James M. Tennant, President of Low Tech Designs, Inc. (LTD), participated in a telephone conference call with FCC staff members Mr. William Kehoe and Ms. Katherine Schroder, to discuss LTD's ex parte filings faxed on this day to Mr. Kehoe and Ms. Schroder. These ex parte filings were submitted in CC Dockets 97-163, 97-164, and 97-165.

Mr. Tennant explained his legal reasoning for FCC assumption of his arbitrations that were denied him by the Illinois Commerce Commission, the Georgia Public Service Commission, and the Public Service Commission of South Carolina respectively. Mr. Tennant emphasized the fact that none of the State Commissions were able to refute in their filings LTD's argument that they failed to act on LTD's arbitration issues that were properly filed in LTD's petitions for arbitration. Mr. Tennant also acknowledged that each petition for assumption contained invalid reasoning that the state commissions used to deny LTD an arbitration hearing, but that the root reason for LTD's petitions for assumption was based on a complete failure to act by the state commissions, and not because of any finding of law by the state commissions. Mr. Tennant also emphasized the legal basis for LTD's status - under the Telecommunications Act of 1996, FCC Rules and the recent Eighth Circuit court rulings - as a requesting telecommunications carrier. Because of this irrefutable status as a requesting telecommunications carrier, LTD is entitled to the right to arbitrate before state commissions. Since none of the states carried out an actual arbitration, they have all failed to act under the 1996 Act.

In reply to questions from the Staff, Mr. Tennant also explained the legal basis for LTD's assertion that its proposed least cost routing service for long distance calls qualifies as a telecommunications service. Mr. Tennant pointed to the definition of an information service in the Act, and showed where information service technology could be used for the management or control of a telecommunications system or service without triggering the information service threshold. Mr. Tennant also explained how Centrex automatic route selection, as provided by ILECs, is an almost identical service to LTD's proposed service. Mr. Tennant also pointed to recent rulings of the FCC (FR&O in CC 92-105, Feb. 19, 1997), declaring *XX codes to be telephone numbers (and therefore dialable by all telephone subscribers) and how the provisioning of advanced intelligent network (AIN) services using *XX codes by companies such as LTD would advance the FCC's desire to see AIN be the telephony equivalent of a open IBM PC programming platform. Mr. Tennant also suggested that the FCC rule

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regarding all-AIN-triggers to the unbundled-switching-port-dialtone-provider to be possibly anti-competitive and constituting an illegal antitrust tying arrangement, and pointed to LTD's proposed officewide, pay-per-use, non-presubscribed *XX implementation of AIN services as a way to keep this emerging market open. Mr. Tennant also discussed LTD's opinion that *XX codes are the telephony equivalent of an Internet Web address and should be made available to all telephone subscribers on an ILEC switch. Mr. Tennant also stated that its *11 (Star*11℠) based least cost routing service might want to be blocked by a company such as AT&T on resold lines or rebundled ports, but that the end user would have the ultimate right to have this telephone number be made available for their dialing. Mr. Tennant explained that his proposed least cost routing service would be the first truly widespread consumer-level electronic commerce application, and would be the tip of the iceberg of services that could be offered to telephone consumers.

LTD certifies that it has included Mr. Kehoe and Ms. Schroder in its service of copies of this cover letter and of the ex parte filings, even thought their names do not appear on the service list attached to each ex parte filing.

LTD has included additional copies in this filing for the individual Commissioner and kindly requests that they be distributed to them.

Thank you for your assistance with this matter.

Sincerely,

James M. Tennant

James M. Tennant
President

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Commission Assumption	)	CC Docket 97-164
of Jurisdiction of Low Tech Designs, Inc.'s	)	
Petition for Arbitration with BellSouth Before the	)	
Georgia Public Service Commission	)	

EX PARTE COMMENTS OF LOW TECH DESIGNS, INC.

Low Tech Designs, Inc. ("LTD") respectfully submits these ex parte comments regarding its petition for Commission assumption of the Georgia Public Service Commissions ("GPSC") jurisdiction of arbitration pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 ("the Act").

The GPSC and BellSouth Telecommunications, Inc. ("BellSouth") both filed comments in opposition to LTD's petition. Both filings confirm the original claim of LTD in its petition, namely, that the GPSC failed to fulfill its duty to arbitrate failed negotiations between LTD and BellSouth.

Neither party put forward evidence that any arbitration decisions were made by the GPSC to resolve the differences between LTD and BellSouth documented in LTD's petition for arbitration. Neither party indicated that LTD's petition was defective in timeliness, content, format or in any substantial manner that would justify the dismissal of same. Instead, both parties put forward arguments that the GPSC was justified in dismissing LTD's petition for arbitration because LTD did not qualify as a telecommunications carrier in the opinion of the GPSC. As LTD asserted in its Petition for Assumption, the Telecommunications Act of 1996, applicable FCC Rules and the legislative history of the Act all point towards the validity of LTD's claim to be considered a new entrant requesting telecommunications carrier, and therefore, entitled to arbitration under the Act.

The drafters of the Act did not anticipate new entrants such as LTD being rebuffed by State Commission in their efforts to enter the marketplace. State

Commissions were given the ***responsibility*** to conduct arbitrations to resolve inevitable differences between new entrant requesting telecommunications carriers and incumbent LECs. If they failed in their responsibility, the FCC was given the responsibility to assume their assigned duty.

Dismissing a properly filed petition for arbitration because the petitioning party does not meet the State's definition of a telecommunications carrier is at odds with the pro-competitive intent of the Act. Section 253(b) of the Act properly anticipates and provide legal basis for the States to continue to issue certificates of authority for the purposes of providing telecommunications services to the public under tariff. Using Section 253(b) as a tool to allow properly filed arbitration requests to be dismissed is not the intent of the Act or of the FCC rules implementing the Act. Until a new entrant requesting telecommunications carrier is able to arbitrate to obtain an interconnection agreement, it is certainly not ready to file for certification in order to actually be given state legal authority to provide the intended telecommunications services.

If LTD is not a telecommunications carrier under the Act, as the GPSC suggests, then the GPSC's authority to block LTD's petition for arbitration is valid. Unfortunately, this legal interpretation also gives BellSouth the basis to deny to LTD their duty to negotiate in good faith issues regarding resale, interconnection and unbundled network elements. This interpretation is therefore absurd and must be dismissed.

Section 252(a)(1), which LTD has consistently cited as its basis for declaring itself a telecommunications carrier, provides the basis for the initiation of voluntary negotiations between parties. It states:

> "Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the ***requesting telecommunications carrier***. . . ."

As this passage indicates, by virtue of presenting a request for interconnection, services or network elements to an incumbent LEC, the requesting party is then considered by the Act to be a requesting telecommunications carrier.

Additionally, LTD has already shown in its filings, before the GSPC and the FCC, that, in the legislative history of the Act, the Conference Committee considered:

> "that the duties imposed under new section 251(b) make sense only in the context of a specific request ***from another telecommunications carrier or any other person*** who actually seeks to connect with or provide services using the LEC's network".

Therefore, for purposes of negotiation with an incumbent LEC, or for purposes of mediation or arbitration before State Commissions, requests from another telecommunications carrier or any other person are equivalent from a federal perspective. All references to a carrier, telecommunications carrier, or requesting telecommunications carrier in the Act must be interpreted with the understanding that any of these carrier designations encompasses any entity bringing a negotiation request to an incumbent LEC. Any other interpretation leads into endless chicken and the egg questions and Catch-22 scenarios regarding how a new entrant becomes a telecommunications carrier. For purposes of creating competitive markets, these situations are unacceptable.

Other legal issues are raised by the parties opposing LTD's petition. BellSouth and the GPSC both argue that LTD should file for Federal district court review of the GPSC decision under (sic) Section 252(b)(6) and that the FCC has no jurisdiction in this case. However, as a close reading of the actual section [(252(e)(6)] indicates, this avenue is for parties that have been aggrieved by a State Commission determination involving an actual interconnection agreement or a statement of generally available terms. LTD has no interconnection agreement that has been approved by the GPSC to be aggrieved with, which is precisely the reason Section 252(e)(5) of the Act applies in this case. As an interesting aside, the GPSC, on page 4 of it's order denying LTD's motion for reconsideration, rehearing and oral argument, made the following statement:

> If Low Tech believes that the Commission should have conducted an arbitration and improperly failed to do so, Section 252(e) provides a procedure whereby Low Tech could petition the FCC to conduct the arbitration is seeks.

Evidently, the GPSC has changed its mind regarding the law, just as BellSouth did when it initially acknowledged LTD as a telecommunications carrier in its response to LTD's original petition for arbitration.

Both BellSouth (on page 7 of its opposition) and the GPSC (on page 5 of its comments) quote, in various degrees of inconsistency, the FCC Rule ((47 C.F.R. 51.301(c)(4))[1] that requires incumbent LECs to negotiate in good faith with telecommunications carriers not yet certificated by State Commissions. Rather than using the FCC's language, which refers to ***requesting telecommunications carriers***, BellSouth refers to negotiations with a "person", while the GPSC refers to negotiations with a "requesting company". This game playing with words is indicative of the lengths these parties will go to evade the truth in this matter. Neither wish to quote the actual rule, since it instantly invalidates their arguments, and supports LTD's.

BellSouth, on page 8 of its opposition, tries to slip in vague references to the recent Eighth Circuit decision as justification for providing deference to the GPSC in their decision to dismiss LTD's petition. The Eighth Circuit decision[2], in the first paragraph of its initial Background section introducing their opinion, first uses the term *competing companies, requesting new entrant*, and then *competing telecommunications carrier*, to describe the entities that are able to avail themselves to the local competition provisions of the Act. In this same paragraph, the Eighth Circuit goes on to say that:

> A company seeking to enter the local telephone service market may request an incumbent LEC to provide it with any one or any combination of these three services.

In their opinion, the Eighth Circuit actually affirms that LTD has in fact followed the entry path provided in the Act by deciding to be a competing company, becoming a requesting new entrant, and then a competing telecommunications carrier. The Eighth Circuit avoids the Catch-22 and chicken and the egg circular arguments that have

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[1] On page 2 of its original petition for assumption, LTD erroneously referred to 47 C.F.R. 51.301(c)(5). The correct citation should be 47 C.F.R. 51.301(c)(4).

[2] LTD currently only has an electronic text version of the decision (Iowa Utilities Board v. FCC, __F.3d__, Nos.96-3321 et. al.) from the Eighth Circuit's Web site. Unfortunately, this version does not have page numbers. LTD will cite this order using paragraph descriptions and numbers.

tripped up BellSouth and the GPSC in determining how one becomes a new entrant requesting telecommunications carrier under the Act.

In the very next paragraph following, the Eighth Circuit decision states:

> If the parties fail to reach an agreement through voluntary negotiation, either party may petition the respective state utility commission to arbitrate and resolve any open issues. The final agreement, whether accomplished through negotiation or arbitration, ***must*** be approved by the state commission. (emphasis added)

As the above confirming court opinion shows, the GPSC has failed in their duty to arbitrate open issues between BellSouth and LTD, a new entrant requesting telecommunications carrier, and has therefore triggered Section 252(e)(5) of the Act. FCC assumption of LTD's arbitration is the only remedy available to LTD and should be initiated as soon as possible to the benefit of all Georgia telecommunications consumers.

Respectfully submitted,

Date: August 12, 1997

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served one copy of the foregoing EX PARTE COMMENTS OF LOW TECH DESIGNS, INC., by depositing same in the United States mail in a properly addressed envelope with adequate postage thereon to insure delivery to the following parties:

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This 12th day of August, 1997.

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